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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jugos Del Valle, S.A. de C.V.

Serial No. 75/210,356

Eric S. Hyman and Farzad E. Amini of Blakely, Sokoloff,
Taylor & Zafman for applicant.

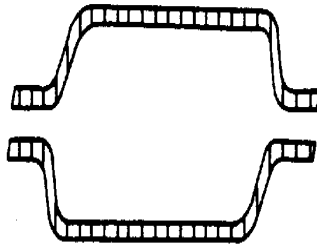
Jason E. Garcia, Trademark Examining Attorney, Law Office
101 (Jerry Price, Managing Attorney).

Before Cissel, Walters and Bucher, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Jugos Del Valle, S.A. de C.V. has filed a trademark application to register the mark shown below, which is lined for the color red, on the Principal Register for "beers, mineral and aerated waters and other non-alcoholic drinks, namely, non-alcoholic beer, non-alcoholic malt coolers, non-alcoholic punch, fruit flavored soft drinks, fruit flavored drinks, soft drinks, sports drinks; fruit drinks and fruit juices;

concentrates, syrups, or powders used in the preparation of soft drinks."¹



The Trademark Examining Attorney has issued a final refusal to register under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. 1051, 1052 and 1127, on the ground that applicant's design is merely a background border design that neither identifies and distinguishes the goods of applicant from those of others nor indicates their source.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

¹ Serial No. 75/210,356, in International Class 32, filed December 9, 1996, based on an allegation of a bona fide intention to use the mark in commerce. The mark was published for opposition on August 5, 1997; and a notice of allowance issued on October 28, 1997. On April 24, 1998, applicant filed its specimens and statement of use, alleging first use as of November 22, 1992, and use in commerce as of April 23, 1996.

Applicant's design appears as follows on the specimens of record, which are photographs of applicant's can in which at least some of its goods are packaged:

The Examining Attorney contends that applicant's design is not inherently distinctive and applicant has not demonstrated that it has acquired distinctiveness as a trademark; that it is merely a background design that is not so uncommon or unusual that it forms a commercial impression separate and apart from the stylized wording "Jugos Del Valle" on the specimens of record; and that it is "only a common carrier design frequently employed in the food and beverage industry to emphasize a word mark."²

² In the final office action, the Examining Attorney then of record characterized the design as a rectangle and submitted copies of third-

Applicant contends that its design is inherently distinctive; that "it is a unique combination of distinctive shapes and colors which may not be described adequately in words, but is clearly not a simple geometric shape"; that "its design is not commonly employed as a background device in Applicant's product field"; and that, as used on the specimens of record, it is not merely a background design for the word VALLE.³

Our determination of whether the design functions as a trademark to identify and distinguish the source of the goods is a factual one based upon our consideration of the mark as it appears on the specimens of record. Considering the specimen photograph of the pineapple juice can shown above, we agree with applicant that its design is a polygon that is not a simple rectangle. However, in choosing words to describe it, we must conclude that it is more rectangular than not. The two non-parallel sides are not straight lines; rather they

party registrations of various rectangular marks for various food items, issued under Section 2(f) of the Trademark Act, in support of her contention that rectangular marks for food items are not inherently distinctive. Not only do we find this evidence insufficient support for the Examining Attorney's contention, but we find it unnecessary and inappropriate to reach this conclusion which, essentially, amounts to a *per se* rule regarding rectangular marks in the food industry.

³ Both the Examining Attorney and applicant submitted copies of third party registrations with their briefs, and neither objected to the submissions of the other. Thus, we have considered these submissions to be part of the record in this appeal.

are mirror images that open outward, creating a banner or bracket effect. The can is principally colored red, the design is red and separated from the overall color of the can by a thin white line, and the writing within the polygon is also red.

While applicant correctly states that its can layout may feature more than one mark, in this case we find that the design is not inherently distinctive. Rather, it merely serves to highlight the word VALLE that appears prominently on the can. We do not conclude that this design is such a common shape that it is incapable of serving as a trademark - that is not the question before us. Thus, this finding does not preclude applicant from making an appropriate showing, in another application, that its design has acquired distinctiveness as a source identifier in connection with applicant's goods.

Decision: The refusal under Sections 1, 2 and 45 of the Act on the ground that the design is not inherently distinctive is affirmed.

R. F. Cissel

C. E. Walters

Serial No. 75/210,356

D. E. Bucher
Administrative Trademark Judges,
Trademark Trial and Appeal Board